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In The

Supreme Court of the United States

EASTERN PILOTS MERGER COMMITTEE,

Petitioner,

v.

CONTINENTAL AIRLINES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court of Appeals for the Third Circuit, in a bankruptcy proceeding involving Continental Airlines, Inc. (Respondent) acknowledged that Continental had not rejected a collective bargaining agreement that affords ongoing and continuing seniority rights to the members of the Eastern Pilots Merger Committee (Petitioner) upon the occurrence of specified events.

The question presented is whether, in these circumstances, the Court of Appeals erred in holding that those asserted seniority rights could be reduced to bankruptcy claims, dischargeable in Continental's bankruptcy proceeding?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

No. ____

EASTERN PILOTS MERGER COMMITTEE,
Petitioner,

v.

CONTINENTAL AIRLINES, INC.
Respondents.

PETITION FOR A WRIT OF CERTIORARI

Eastern Pilots Merger Committee ("EPMC") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case. The Court of Appeals held that Continental Airlines, Inc. ("Continental") did not reject a collective bargaining agreement that affords EPMC's members seniority rights under specified circumstances. Disregarding decisions of this Court and the Court of Appeals for the Fifth Circuit, the court also held, however, that these same seniority rights could be reduced to a dischargeable bankruptcy claim. This is the identical treatment that would have resulted had the collective bargaining agreement been rejected during Continental's bankruptcy proceeding. Accordingly, the court below effectively nullified Bankruptcy Code § 1113, 11 U.S.C. § 1113, which imposes detailed restrictions on the ability of a

company in bankruptcy to rid itself of rights under a collective bargaining agreement.

Review is warranted because the question presented raises a recurring issue of paramount importance regarding the effect of non-rejection on continuing rights under collective bargaining agreements and other executory contracts after a bankruptcy proceeding. The Court's review is essential to resolve the conflict between the decision below and the decision of the Court of Appeals for the Fifth Circuit in *Century Indem. Co. v. National Gypsum Co. (In the Matter of Nat'l Gypsum Co.)*, 208 F.3d 498 (5th Cir.), *cert. denied*, 531 U.S. 871 (2000), and to clarify this important area of the law.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 279 F.3d 226, and is reprinted at pages 1a-14a of the Appendix to this Petition ("Pet. App.").[1/] The decision of the United States District Court for the District of Delaware is unpublished, but is reprinted at Pet. App. 17a-22a. The decision of the United States Bankruptcy Court for the District of Delaware is reported at 236 B.R. 318, and is reprinted at Pet. App. 23a-50a.

An earlier decision of the United States Court of Appeals for the Third Circuit in this case is reported at 125 F.3d 120 and is reprinted at Pet. App. 51a-89a. The decision of the United States District Court for the District of Delaware from which that appeal was taken is unpublished, and is reprinted at Pet. App. 90a-135a. The order of the United States Bankruptcy Court for the District of Delaware from which the appeal to the

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[1/]The Appendix is bound in a separate volume.

District Court decision was taken is unpublished, and is reprinted at 136a-214a.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2002. Pet. App. 15a-16a. The Eastern Pilots Merger Committee filed a petition for rehearing or for rehearing en banc on February 7, 2002, which was denied by order dated April 2, 2002. Pet. App. 255a-256a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves sections 365 and 1113 of the United States Bankruptcy Code, 11 U.S.C. §§ 365, 1113, which are set forth at Pet. App. 257a-275a.

STATEMENT OF THE CASE

Background

For over forty-five years, Eastern Air Lines, Inc. ("Eastern") and the Air Line Pilots Association International ("ALPA") were parties to successive collective bargaining agreements governed by the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq*. *In re Ionosphere Clubs, Inc.*, 105 B.R. 761, 762 (Bankr. S.D.N.Y. 1989).[2/] In early 1986, after intense negotiations,

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[2/]Eastern was an air carrier subject to the RLA. *In re Ionosphere Clubs, Inc.*, 114 B.R. 379, 381 (S.D.N.Y. 1990). ALPA is an unincorporated labor organization that was the authorized collective bargaining representative under the RLA for the pilots employed by Eastern. *Id.*

Eastern and ALPA entered into a collective bargaining agreement (the "Agreement") that included Labor Protective Provisions ("LPPs"). Pet. App. 54a. Under these LPPs, "Eastern's pilots secured protection of their seniority rights in the event of a merger between Eastern and another airline carrier" by requiring the "integration of Eastern's seniority lists with the merging carrier's list." *Id.* Less than twenty-four hours after the parties entered into the Agreement, Texas Air Corporation, parent corporation of Continental Airlines, Inc. ("Continental"), acquired Eastern. *Id.*

ALPA subsequently concluded that Continental and Eastern had effectively merged, as defined by the LPPs. *Id.* When Eastern disagreed with its conclusion, ALPA initiated arbitration before the System Board of Adjustments ("SBA"), the arbitral panel responsible under the RLA for adjudicating disputes under the Agreement. *Eastern Air Lines, Inc. v. ALPA*, 861 F.2d 1546, 1549 (11th Cir. 1988). In response, Eastern sought a declaratory judgment that there was no collective bargaining agreement between the parties, on the ground, *inter alia*, that the parties disagreed about the meaning of several provisions of the purported Agreement, including the LPPs. *Id.* The Court of Appeals for the Eleventh Circuit ultimately ruled in ALPA's favor, holding that a collective bargaining agreement was in effect, and that the parties were obligated to arbitrate their disputes regarding the meaning of the ambiguous provisions. *Id.* at 1550, 1555.

The arbitration previously initiated by ALPA then proceeded, with the SBA addressing a number of preliminary questions regarding the meaning of the LPPs. Pet. App. 215a. In an opinion authored by the neutral referee, Professor Frank Elkouri, the SBA construed the Agreement to incorporate LPPs that provided the Eastern pilots with a right to seniority integration upon the occurrence of certain defined events,

including a merger. *See* Pet. App. 217a-220a & n.2 (*quoting* full text of provisions held to be incorporated). The SBA also interpreted the LPPs under the Agreement to create a continuing obligation:

> [T]he right of pilots to know the general scope of their contractual LPP protection, and their right to insist that the Company likewise know, and their right to insist that the Company not deny the existence or general scope of the contractual LPP protection, are all continuing rights: *each and every day that these rights are denied to the pilots by the Company, their right to protest by grievance arises anew.*

Id. at 225a (footnote omitted) (emphasis added).

Whether a merger had in fact occurred was not before the SBA, *id.*, and before the parties could proceed to that step, Eastern and its affiliates filed for bankruptcy in the Southern District of New York. *See In re Ionosphere Clubs, Inc.*, 105 B.R. at 763. Citing the automatic stay in section 362 of the Bankruptcy Code, Eastern refused to submit to further arbitration, and the Bankruptcy Court denied ALPA's request for relief from the stay. *Id.* at 765. On appeal, the District Court reversed, *In re Ionosphere Clubs, Inc.*, 114 B.R. at 381, and the Court of Appeals for the Second Circuit affirmed, 922 F.2d 984 (2d Cir. 1990), holding that the application of the automatic stay to allow Eastern to avoid its obligation to arbitrate the LPP dispute was impermissible in the "absence of the debtor's compliance with the requirements of section 1113

[of the Bankruptcy Code]." Pet. App. 87a (describing Second Circuit's holding).[3/]

In April 1991, ALPA and Eastern proceeded to arbitration before arbitrator Richard Kasher. Pet. App. 56a. Continental was invited to participate, but by this time, the airline had filed for bankruptcy. *Id.* And despite the earlier Second Circuit decision in Eastern's bankruptcy, Continental refused to arbitrate, repeating Eastern's argument that the arbitration was stayed under section 362 of the Bankruptcy Code. *Id.* Arbitrator Kasher disagreed, ruling in August, 1992, that he had jurisdiction over the LPPs dispute and could render a determination of the appropriate remedies; relying on the Second Circuit's decision in Eastern's bankruptcy, he rejected Continental's suggestion that the arbitration was barred by the automatic stay. Pet. App. 57a. He scheduled hearings on the merits of the LPPs dispute to commence in February of 1993. *Id.*

The First Bankruptcy Court Decision

In September 1991, ALPA had filed protective proofs of claim ("Claims") in Continental's bankruptcy, based on its members' right to seniority integration.[4/] Continental

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[3/]Eastern had filed a motion in the Bankruptcy Court to reject the Agreement pursuant to Bankruptcy Code § 1113, 11 U.S.C. § 1113, but later withdrew the motion. *In re Ionosphere Clubs, Inc.*, 922 F.2d at 987.

[4/]The Claims sought specific performance of Continental's obligation under the LPPs, together with money damages to compensate the pilots for the time period prior to the arbitration during which Continental had not complied with its obligation to integrate the seniority lists, and for the time period after an

responded with an action in the Bankruptcy Court. Based on the automatic stay, the airline sought injunctive relief to stop the Kasher arbitration. It also sought declaratory relief that seniority integration would be detrimental to Continental's successful reorganization, and that the Claims should be declared general unsecured claims, compensable by an award of monetary damages and dischargeable in bankruptcy. Pet. App. 57a-58a & n.4. ALPA and a group of pilots represented by separate counsel (the "LPP Claimants") opposed. *Id.*

In April of 1993, notwithstanding arbitrator Kasher's August 1992 ruling (and the decision of the Court of Appeals for the Second Circuit in the Eastern bankruptcy case), the Continental Bankruptcy Court ruled that the Kasher arbitration was prohibited by the automatic stay. Pet. App. 136a ("Confirmation Order"). The court also incorporated by reference rulings from February 1993 that the equitable remedy of seniority integration was a "claim" within the meaning of the Bankruptcy Code and could be satisfied by monetary awards in lieu of specific performance, and that this claim was not entitled to administrative expense treatment. Pet. App. 154a-155a.

The First District Court Decision

After appealing the Bankruptcy Court's orders to the District Court, ALPA settled with Continental, but the LPP Claimants

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arbitration during which the Eastern pilots would not yet be flying because they would be engaged in FAA-required training to take their positions. Pet. App. 93a-94a. ALPA filed the Claims because Continental had filed a motion in the bankruptcy court seeking a ruling that it was not bound by the Agreement. The bankruptcy court never ruled on that motion.

continued their appeal. Pet. App. 96a-97a. On that appeal, the District Court made several rulings. It dismissed as moot the pilots' appeal from that portion of the Bankruptcy Court's decision denying administrative expense status to the Claims, and it affirmed the Bankruptcy Court's ruling that the Claims for equitable relief could be converted to money damages. However, it also vacated the injunction against the arbitration on the grounds that the Bankruptcy Court lacked jurisdiction to issue it. Pet. App. 129a-130a.

The First Court of Appeals Decision

Continental, the LPP Claimants, and another group of pilots represented by separate counsel (the members of Petitioner, the Eastern Pilots Merger Committee ("EPMC")), appealed to the Court of Appeals for the Third Circuit. Pet. App. 63a. The Court of Appeals affirmed ("*Continental I*").

The Court of Appeals ruled that "the bankruptcy court was well within its authority to exercise jurisdiction over the issue of the status of the bankruptcy claim[s]." Pet. App. 70a. The Court also affirmed the decisions of the lower courts that the pilots' seniority rights could be converted to bankruptcy claims for money damages. *Id.* at 70a-83a. Significantly, however, the Court "limited" its holding to "how the claims should be treated in bankruptcy":

> We take care to note the boundaries of our holding. It is not our purpose to suggest the award the arbitrator should grant, if an award is warranted upon disposition of the LPP dispute. Our holding is limited to how the claims should be treated in bankruptcy. Simply put, we hold that any claim based on an award of seniority integration arising out of the resolution of the LPP

> dispute will be treated as a claim in bankruptcy giving rise to a right of payment.

Pet. App. 83a.

The Court of Appeals also held that the District Court properly vacated the injunction barring arbitration of the underlying LPP dispute because Continental – having elected not to reject the Agreement under section 1113 of the Bankruptcy Code – was bound by the mandatory arbitration provisions of the Agreement. Pet. App. 84a-89a. "[E]nforcement of the injunction would have the effect of permitting Continental to escape its duty to arbitrate under the collective bargaining agreement . . . ." Pet. App. 87a. The Court unequivocally rejected the argument that Continental was not bound by the Agreement.

This Court denied petitions for a writ of certiorari. *LPP Claimants v. Continental Airlines, Inc.*, 522 U.S. 1114 (1998).

The Second Bankruptcy Court Decision

After the decision in *Continental I*, a dispute arose over the scope of the arbitration to be conducted as a result of the decision. Continental asserted that the pilots were entitled to arbitrate *only* the existence and amount of bankruptcy claims, i.e., that they had no continuing rights subsequent to entry of the Confirmation Order. R. 385-86.[5/] EPMC, believing that the Court of Appeals had addressed nothing more than how the Claims should be treated in bankruptcy, contended that its

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[5/]References to "R.__" are to the pages of the joint appendix in the Court of Appeals.

members were also entitled to arbitrate their post-Confirmation Order rights under the Agreement. *Id.* at 386, ¶ 23.

Because the parties were unable to resolve this dispute, EPMC filed suit in the United States District Court for the District of New Jersey (where Continental operates a significant hub) seeking declaratory relief that, because Continental had not rejected the Agreement, it had a continuing obligation to comply with the Agreement – and the requirements of the LPPs – after issuance of the Confirmation Order (the "New Jersey Action"). Pet. App. 35a. Continental immediately filed a motion, in the United States Bankruptcy Court for the District of Delaware, seeking a determination that the Confirmation Order barred the New Jersey Action. *Id.*

In the Bankruptcy Court, EPMC contended that the New Jersey Action was not barred by the Confirmation Order because it sought relief for the continuing breach of the LPPs that occurred after issuance and substantial consummation of the Confirmation Order. Pet. App. 32a, 35a. The Bankruptcy Court disagreed. Pet. App. 37a. It held that EPMC's Claims had been raised during the bankruptcy proceeding and discharged by the Confirmation Order and that the Claims subsumed *all* of the pilots' rights. *Id.* The court was "convinced" that this result was "compelled" by *Continental I.* Pet. App. 39a-40a. In the words of the Bankruptcy Court:

> Clearly, the Third Circuit's decision did not contemplate that the Eastern pilots would retain their right to seniority integration *after* confirmation of the Continental Plan. Rather, the Court concluded that any right to seniority integration (without distinguishing between pre or post-confirmation) gave rise to a claim for money

> damages which was discharged by the Confirmation Order.

Pet. App. 43a (emphasis in original). For this reason, it directed EPMC to dismiss the New Jersey Action. *Id.* at 50a. It also imposed sanctions on EPMC for violating the Confirmation Order by bringing the New Jersey Action. *Id.* at 49a.

The Second District Court Decision

On appeal, the District Court affirmed. Pet. App. 22a. The District Court conceded that the Agreement had survived Continental's bankruptcy, and that the Third Circuit had not "h[e]ld that the pilots' claims for prospective relief were discharged by the confirmation order." Pet. App. 20a. It nevertheless held that *Continental I* precluded any post-Confirmation Order relief. According to the District Court, "although the [Agreement] survived the bankruptcy process, appellants' demands for specific performance of the seniority integration clause did not." *Id.* at 21a. As a consequence, the District Court affirmed the Bankruptcy Court's ruling that the New Jersey Action violated the Confirmation Order, and affirmed the lower court's award of sanctions. *Id.* at 21a-22a.[6]

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[6]On February 3, 2000, in connection with a separate adversary proceeding in the Bankruptcy Court, each of EPMC's members withdrew their bankruptcy Claims. See R. 399. They took this action based on an express agreement by Continental that:

> Any EPMC member who withdraws his or her Proof of Claim in this Reorganization shall be entitled to attempt to recover damages and such other relief, including, but not limited to, back pay

The Second Court of Appeals Decision

EPMC appealed again to the Court of Appeals for the Third Circuit, arguing that the lower courts had misunderstood the decision in *Continental I* – that the decision did not affect the rights of EPMC's members to continuing relief under the Agreement itself. Pet. App. 5a. EPMC pointed out that, under the lower courts' interpretation of *Continental I*, the pilots were being treated as if the Agreement had been rejected, even though it was undisputed that this had not occurred. EPMC argued in the alternative that if the lower courts were right, the decision in *Continental I* was contrary to the teachings of this Court and to decisions of the other Courts of Appeals and should, therefore, be reconsidered. Pet. App. 14a.

In a decision issued on January 25, 2002 ("*Continental II*"), a panel of the Court of Appeals reiterated its prior holding that

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> and benefits and the right of employment, as may be awarded in any judicial forum or arbitration proceeding, except there shall be no recovery under the Plan [of Reorganization]. Neither Continental nor any other party to the [separate adversary] Proceeding shall raise, in defense or otherwise, the existence of any decision in, nor any order or judgment in the Proceeding, except this Order, in any such action or arbitration proceeding.

R. 401. This stipulation eliminated any Claim for retroactive money damages as either an unsecured or administrative claim in bankruptcy, but left open the question of appropriate post-Confirmation Order relief.

Continental had not rejected the Agreement. Pet. App. 6a. It nevertheless held that EPMC's members lacked any post-confirmation rights under the Agreement; that despite Continental's failure to reject, all the pilots' rights under the Agreement were properly treated as bankruptcy claims and discharged. *Id.* According to the Court:

> In *Continental I*, this court, as did the bankruptcy court and the district court, did not reject the Agreement. We *interpreted* it. We construed the seniority provisions of the Agreement as a basis of providing a right of payment in lieu of injunctive relief after considering a variety of factors to include feasibility.

Pet. App. 6a-7a (emphasis in original). Further emphasizing the point, the Court continued:

> Suffice it to say that when we said "any claim based on an award of seniority integration," we meant precisely what we said. With apologies to Gertrude Stein, "any claim" means any claim. If we intended to limit the Claim to pre-petition activity, we would have said so.

Pet. App. 10a. The Court concluded, accordingly, that EPMC was precluded from relitigating the issue.[7/]

[7/]After discussing the doctrines of claim preclusion, issue preclusion and the "law of the case" and stating that the appeal "fits squarely within" the doctrine of law of the case as described by Professor Vestal (*see* Pet. App. 13a), the panel stated that, under any of these doctrines, "Appellants

EPMC filed a petition for panel rehearing and for rehearing *en banc* on February 8, 2002. The Court asked Continental for a response, which Continental filed on March 1, 2002. The Court denied EPMC's petition on April 2, 2002.

REASONS FOR GRANTING THE WRIT

A. THE DECISION BELOW IS INCONSISTENT WITH A DECISION OF THIS COURT AND CREATES A SPLIT IN THE CIRCUITS THAT SHOULD BE RESOLVED.

The Court of Appeals for the Third Circuit stated unequivocally in this case that Continental did not reject the collective bargaining agreement that provides EPMC's members with seniority rights. *See, e.g.*, Pet. App. 7a ("The reality is that the Agreement has never been rejected."). The court nevertheless held that all of EPMC's rights under the Agreement had been reduced to bankruptcy "claims" that were dischargeable in Continental's bankruptcy. Pet. App. 9a-11a. This holding is inconsistent with this Court's decision in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), and squarely in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Century Indem. Co. v. National Gypsum Co. (In the Matter of Nat'l Gypsum Co.)*, 208 F.3d 498 (5th Cir.), *cert. denied*, 531 U.S. 871 (2000), which expressly holds that, absent rejection, an executory contract does not give rise to a claim in bankruptcy. *Id.* at 507, 508.

[Petitioners here] are bound by our previous decision." *Id.* at 14a. As the panel apparently recognized by its reference to Professor Vestal's definition, the applicable doctrine in this instance was indeed the law of the case, since the second appeal arose in the same proceeding as the first. *See* n. 11, *infra*.

Prior to the enactment of Bankruptcy Code § 1113 in 1984, collective bargaining agreements were treated much the same as any other executory contract in a bankruptcy proceeding. Pursuant to Bankruptcy Code § 365, the trustee or debtor-in-possession could decide unilaterally to reject or assume the collective bargaining agreement, without regard for restrictions on employers such as the unfair labor practice provisions of the National Labor Relations Act. *See Bildisco*, 465 U.S. at 516-17. If a collective bargaining agreement or other executory contract were rejected, the rejection constituted a breach of the contract which related back to the date immediately preceding the filing of the petition in bankruptcy, thus giving rise to a claim in bankruptcy for the damages resulting from the breach. *Id.* at 530 (*citing* 11 U.S.C. § 365(g)(1)), 531.

In response to this Court's decision in *Bildisco*, Congress enacted Bankruptcy Code § 1113. In that section, Congress "created an expedited form of collective bargaining with several safeguards designed to insure that employers did not use Chapter 11 as medicine to rid themselves of corporate indigestion." *Century Brass Prods. v. UAW (In re Century Brass Prods., Inc.)*, 795 F.2d 265, 272 (2d Cir.), *cert. denied*, 479 U.S. 949 (1986). Section 1113 sets forth detailed procedural and substantive requirements a debtor must follow before a bankruptcy court may approve the alteration or rejection of a collective bargaining agreement.

Section 1113 provides, in two different subsections, that its provisions are the exclusive means by which a collective bargaining agreement can be modified. Subsection (a) states that a debtor may reject a collective bargaining agreement "*only* in accordance with the provisions of this section." 11 U.S.C. § 1113(a) (emphasis added). And subsection (f) states that:

> [n]o provision of [the Code] shall be construed to permit a [debtor] to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

11 U.S.C. § 1113(f). This language "plainly imposes a legal duty on the debtor to honor the terms of a collective bargaining agreement, at least until that agreement is properly rejected." *Adventure Resources, Inc. v. Holland*, 137 F.3d 786, 796 (4th Cir.), *cert. denied*, 522 U.S. 962 (1998). Consequently, if a debtor fails to reject a collective bargaining agreement, the debtor assumes the agreement by operation of law. *See, e.g., id.* at 798; *In re Roth American, Inc.*, 975 F.2d 949, 957 (3d Cir. 1992).

Although the enactment of Code § 1113 altered the means by which a collective bargaining agreement could be rejected, it did not otherwise alter the applicability of section 365 to such agreements. *See, e.g., Adventure Resources*, 137 F.3d at 798 ("in erecting § 1113's substantive and procedural obstacles to the unilateral rejection of collective bargaining agreements, Congress did not indicate that it intended to otherwise restrict the general application of § 365 to those agreements"); *Tool & Die Makers Local Lodge No. 113 v. Buhrke Indus., Inc.*, 1996 U.S. Dist. LEXIS 3314, *27 (N.D. Ill. Mar. 14, 1996) (same). Section 1113 applies only to the means by which a collective bargaining agreement may be *rejected*; the *assumption* of such agreements continues to be governed by Code § 365. *Norfolk & W. Ry. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 136 n.2 (1991) (Stevens, J., *dissenting*); *American Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76, 82 (3d Cir. 1999); *Wien Air Alaska, Inc. v. Bachner*, 865 F.2d 1106, 1111 & n.5 (9th Cir. 1989); *Massachusetts Air*

Conditioning & Heating Corp. v. McCoy, 196 B.R. 659, 663 (D. Mass. 1996).

Thus, except for the means by which it may be rejected, the treatment of a collective bargaining agreement under section 365, as described by this Court in *Bildisco*, remains unchanged. If the agreement is rejected [in accordance with the requirements of section 1113], it gives rise to a pre-petition general unsecured claim for the damages resulting from the breach. 465 U.S. at 530, 531. If the agreement is assumed, it must be assumed *cum onere*, "and the expenses and liabilities incurred may be treated as administrative expenses, which are afforded the highest priority on the debtor's estate." *Id.* at 531-32 (citation omitted). As stated by the Court of Appeals for the Ninth Circuit, after the enactment of section 1113:

> To *reject* a collective bargaining agreement, a debtor must first engage in collective bargaining with the authorized bargaining representative in an attempt to reach a mutually satisfactory modification of the agreement, and then apply for court approval after notice and a hearing. 11 U.S.C. § 1113 (1982). To *assume* a collective bargaining agreement, a debtor must cure any default and provide adequate assurance of future performance if the court finds such assurance necessary. 11 U.S.C. § 365(b)(1).

Wien Air, 865 F.2d at 1111 (footnote omitted). *See also Adventure Resources*, 137 F.3d at 798 ("as conditions of the contract's assumption, the debtor [must] cure any existing default and compensate all non-debtor parties for actual pecuniary losses that have resulted therefrom.").

Consistent with the foregoing principles, if a collective bargaining agreement is not rejected, it "rides through" the debtor's bankruptcy proceeding, as if the bankruptcy had never occurred. *National Gypsum*, 208 F.3d at 504 n.4 ("If an executory contract is neither assumed nor rejected, it will 'ride through' the proceedings and be binding on the debtor even after a discharge is granted, thus allowing the non-debtor's claim to survive the bankruptcy.") (*citing Federal's Inc. v. Edmonton Inv. Co.*, 555 F.2d 577, 579 (6th Cir. 1977)). *See also Bildisco*, 465 U.S. at 546 n.12 (Brennan, J., concurring and dissenting) (if "the contract is neither accepted nor rejected, it will 'ride through' the bankruptcy proceeding and be binding on the debtor even after a discharge is granted."); *UFCW Local 211 v. Family Snacks, Inc. (In re Family Snacks, Inc.)*, 257 B.R. 884, 907 n.19 (B.A.P. 8th Cir. 2001) (if a debtor fails to assume or reject a collective bargaining agreement, the agreement "effectively 'rides through' the bankruptcy process." (citation omitted)).

A necessary corollary to the principle that an unrejected executory contract "rides through" a bankruptcy with its obligations intact is the principle, explicitly articulated by the Court of Appeals for the Fifth Circuit in *National Gypsum*, that the non-debtor party to the contract has no claim in the bankruptcy. In the words of that Court, "under the Bankruptcy Code, [an executory contract] that has been assumed under a plan or pursuant to section 365 does not give rise to a claim." 208 F.3d at 507 (*quoting Wainer v. A.J. Equities, Ltd.*, 984 F.2d 679, 684 (5th Cir. 1993)). The "assumed obligation is a postpetition debt that is not discharged by a confirmation of a chapter 11 case, and it therefore continues to be an obligation of the reorganized debtor." *Id.* at 508 (*quoting Frank C. Videon, Inc. Employees Pension Trust v. Marple Publ'g Co. (In re Marple Publ'g Co.)*, 20 B.R. 933, 935 (Bankr. E.D. Pa.

1982)) (emphasis omitted).[8] In the decision below, by contrast, the Third Circuit held that all of EPMC's rights under the assumed collective bargaining agreement constitute a claim, dischargeable in Continental's Chapter 11 case. The decision is, accordingly, squarely in conflict with the Fifth Circuit's holding in *National Gypsum*.

In *National Gypsum*, the debtor (National Gypsum) assumed an executory contract while in bankruptcy. 208 F.3d at 502. Century Indemnity Company had paid certain amounts on behalf of National Gypsum prior to the date on which National Gypsum filed for bankruptcy, which National Gypsum had failed to repay. *Id.* After National Gypsum's reorganization plan was confirmed, Century sought to collect the amounts due under the assumed contract, but National Gypsum refused to pay. *Id.* at 503. It argued that "an amount due in default on an assumed executory contract is subject to the claims discharge provisions of [Bankruptcy Code] §1141(d)," and that the bankruptcy court's confirmation order had, therefore, eliminated any relief due Century. *Id.* at 504. According to National Gypsum, moreover, the bankruptcy court's confirmation order precluded relitigation of the issue whether Century was entitled to any relief. *Id.* at 503.

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[8] *See also Chicago Dist. Council of Carpenters Pension Fund v. Cotter*, 914 F. Supp. 237 (N.D. Ill. 1996) (enforcing debtor's post-confirmation pension obligation under unrejected collective bargaining agreement); *Polysat, Inc. v. Union Tank Car Co. (In re Polysat, Inc.)*, 152 B.R. 886 (Bankr. E.D. Pa. 1993) (executory contract that was neither rejected nor assumed remains enforceable post-confirmation; debtor not entitled to enjoin creditor's efforts to obtain post-confirmation relief).

The facts here are remarkably similar. Continental assumed the Agreement during bankruptcy by failing to reject it in accordance with Bankruptcy Code § 1113. It owed EPMC's members relief under the Agreement prior to filing for bankruptcy. After Continental's reorganization plan was confirmed, EPMC sought the relief owed under the assumed Agreement, but Continental refused to provide it, arguing that EPMC's rights under the Agreement had been reduced to claims and discharged by the Confirmation Order pursuant to the provisions of Bankruptcy Code § 1141(d). Continental also argued, like National Gypsum, that the Confirmation Order precluded relitigation of the issue.

These virtually identical fact patterns have, however, led to diametrically opposed results. The Court of Appeals for the Fifth Circuit, applying fundamental principles of bankruptcy law as articulated by this Court and others, held that, by virtue of the assumption of the contract, the creditor had no claim to be discharged. *National Gypsum*, 208 F.3d at 507 ("a claim arises only from the rejection of an unexpired lease or executory contract, not from the assumption of such a lease or contract."). The court below, by contrast, accepted Continental's argument, and held that all of EPMC's rights were "claims" that had been discharged by the Confirmation Order. Pet. App. 6a. The conflict could not be more clear.[2/]

The court below, for the first time in the course of this lengthy proceeding, attempted to explain its anomalous decision with the assertion that it was merely "interpreting" the collective bargaining agreement. Pet. App. 6a-7a. Decisions

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[2/]Significantly, because this decision had not been issued when this Court declined to review the decision in *Continental I*, the current circuit conflict did not then exist.

of this Court make clear, however, that a federal court lacks jurisdiction to interpret a collective bargaining agreement, like this one, that is covered by the RLA.

The RLA is a comprehensive statute that was designed to "provide for the prompt and orderly settlement of all disputes, concerning rates of pay, rules and working conditions." 45 U.S.C. § 151a; *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, *aff'd on reh'g*, 327 U.S. 661 (1946). This Court has repeatedly held that disputes relating to the interpretation of a collective bargaining agreement are "minor" disputes under the RLA, committed to the exclusive jurisdiction of arbitrators. *See, e.g., Consolidated Rail Corp. v. Railway Labor Executives Ass'n*, 491 U.S. 299, 306-07 (1989) (any dispute involving the interpretation of a collective bargaining agreement must be submitted to and resolved by arbitration); *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 322 (1972) ("the notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law."); *Walker v. Southern Ry.*, 385 U.S. 196, 198 (1966) (RLA compels arbitration of minor disputes). The Courts of Appeals have also so held. *See, e.g., Brotherhood of Locomotive Eng'rs Div. 269 v. Long Island R.R.*, 85 F.3d 35, 37-38 (2d Cir. 1996); *National R.R. Passenger Corp. v. International Ass'n of Machinists & Aerospace Workers*, 915 F.2d 43, 49 (1st Cir. 1990); *Eastern Air Lines v. ALPA*, 861 F.2d at 1554; *Pan Am World Airways, Inc. v. Civil Aeronautics Bd.*, 683 F.2d 554, 559 (D.C. Cir. 1982). The Court of Appeals for the Third Circuit itself so held, in *Independent Ass'n of Continental Pilots v. Continental Airlines*, 155 F.3d 685, 691 (3d Cir. 1998) ("[j]urisdiction to entertain the merits of a minor dispute rests *exclusively* with the arbitral forum." (emphasis added)). The decision of the court

below cannot, therefore, be defended on the ground relied on by the court.[10/]

In reaching its conclusion that it was precluded from revisiting the decision in *Continental I*, the court below reiterated the earlier panel's apparent concern that Continental's plan of reorganization would not be "feasible" if the pilots' seniority rights were not extinguished. Pet. App. 9a. Prior to the enactment of section 1113, this approach to a collective bargaining agreement would have been entirely appropriate. As this Court said in *Bildisco*, 465 U.S. at 526:

> [T]he Bankruptcy Court should permit rejection of a collective-bargaining agreement under § 365 of the Bankruptcy Code if the debtor can show that the collective-bargaining agreement burdens the

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[10/]Indeed, the *Continental I* panel, whose decision the court in *Continental II* purported to be explaining, carefully stated that it was *not* interpreting the agreement:

> We discern no inconsistency between the bankruptcy court's exercise of jurisdiction to determine the status of the bankruptcy claim and the district court's characterization of the issue of the Claimants' standing under the LPPs as a "minor" dispute. The bankruptcy court's ruling related only to the manner in which the Claimants' claims in bankruptcy would be treated if a right to seniority integration is established. *This ruling*, unlike the standing issue, *does not turn on an interpretation of the LPPs.*

Continental I, Pet. App. 71a n.8 (emphasis added).

> estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract.

"It was precisely this holding," however, "that inspired Congress's almost immediate enactment of § 1113 'to preclude employers from using bankruptcy law as an offensive weapon in labor relations by going into bankruptcy and unilaterally rejecting or modifying the extant collective bargaining agreement (or exerting leverage at the bargaining table by threatening to do so).'" *Adventure Resources*, 137 F.3d at 797-98 (*quoting In re Roth American*, 975 F.2d at 956 (citations omitted)). Subsequent to the enactment of section 1113, the approach adopted below ignores the unequivocal Congressional mandate, set forth in section 1113, that a collective bargaining agreement may be rejected "*only* in accordance with the provisions of [section 1113]," 11 U.S.C. § 1113(a) (emphasis added), and that "no provision of [the Code] shall be construed to permit a debtor to unilaterally terminate" a collective bargaining agreement "prior to compliance with the provisions of [section 1113]." 11 U.S.C. § 1113(f). If elimination of the pilots' rights under the Agreement was, in fact, essential to Continental's reorganization, the airline should have – and would have – followed the steps necessary to reject the Agreement under section 1113.[11/]

[11/]As noted at p. 12, *supra*, Petitioner argued in the court below that the decision in *Continental I*, rendered at an earlier state of the same proceeding, did not preclude the members of EPMC from obtaining prospective post-Confirmation Order relief under the Agreement. Petitioner also argued in the alternative that if *Continental I* did preclude such relief, the decision should be reconsidered. The panel decision below rejected both arguments, and we submit it erred on both grounds. With respect to the second, although the earlier panel decision was

B. THE DECISION BELOW CONCERNS AN ISSUE OF EXCEPTIONAL NATIONAL IMPORTANCE.

As a result of the decision below, the Third Circuit stands alone among the courts of appeals in holding that rights under a collective bargaining agreement that has not been rejected can nevertheless be reduced to a claim dischargeable in bankruptcy. Under the decision, Continental has rid itself of an onerous provision in the collective bargaining agreement without so much as a nod to section 1113, and the pilots are left with the treatment they would have been afforded if the agreement had been rejected. After this decision, debtors in the Third Circuit will not find it necessary to comply with the detailed and

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"the law of the case," this doctrine differs from the doctrine of res judicata (claim and issue preclusion) in that it does not bind the court that issued the earlier decision if it can be shown that reconsideration is warranted by developments since the original decision or that the original decision results in manifest injustice. *See generally* 18B WRIGHT, MILLER & COOPER, *Federal Practice and Procedure* § 4478 *et seq.* (2002). Both conditions were met in this case. The decisions of the Courts of Appeals for the Fourth and Fifth Circuits in *Adventure Resources* and *National Gypsum*, respectively, were intervening developments warranting reconsideration. Reconsideration was also warranted because the earlier panel decision (as interpreted by the later panel decision now under review) resulted in manifest injustice in that the pilots were being treated as if the Agreement had been rejected, even though the court unequivocally held that it had not.

In any event, this Court, as a superior Court, is not bound by the "law of the case" as declared by either the first or second panels in the court below in this case.

rigorous requirements of Bankruptcy Code § 1113 in order to modify or terminate their collective bargaining agreement; they need only breach the offending provision, and then ask the bankruptcy court to convert the employees' rights to a claim for money, which they can then discharge for pennies on the dollar.

A simple example, based on a common scenario, will illustrate the effect of the panel's decision. A company in ailing financial health, desiring to save money by downsizing its operations, lays off its most senior employees in violation of a provision in its collective bargaining agreement that requires layoffs to be in inverse order of seniority. The laid-off employees file a grievance, but before the dispute can be resolved, the employer files for bankruptcy. The employer takes no action to modify the collective bargaining agreement in accordance with the requirements of Bankruptcy Code § 1113, because it recognizes that it will not be able to demonstrate, as the statute mandates, that a balancing of the equities favors elimination of the seniority provision. *See* 11 U.S.C. § 1113(c)(3). The Third Circuit alone has held that this would not be the end of the matter. In other circuits that have considered the question, absent a section 1113 rejection or modification, the employer would be compelled to reinstate the employees, make them whole, and comply fully with its ongoing obligations under the agreement, including the seniority provisions.

In the Third Circuit, as a result of the decision below, the employer could rid itself of the offending provisions merely by asking the bankruptcy court to convert the laid-off employees' seniority rights to a right of payment, which the employer could then discharge in "bankruptcy dollars" as part of its plan of reorganization. That result returns the Third Circuit to the state of the law after this Court's decision in *Bildisco* and before the enactment of section 1113. Under these circumstances, any

employer who is burdened with an onerous collective bargaining agreement and can file for bankruptcy reorganization in the Third Circuit would certainly choose to do so.[12/]

An electronic search in LEXIS reveals that Bankruptcy Code § 1113 has been invoked by the lower federal courts nearly 200 times since its enactment in 1984. And the Bureau of Labor Statistics reported earlier this year that in 2001, nearly 18 million American workers were covered by a union contract.

[12/]This case is especially significant because of the major role played by the Third Circuit in the handling of corporate bankruptcies. In the twelve months ending March 31, 2002, for example, there were more Chapter 11 business bankruptcies filed in the Third Circuit than in any other circuit in the country except the Ninth. Of 11,477 total business filings under Chapter 11 nationwide, nearly 17% were filed in the Third Circuit, Administrative Office of the U.S. Courts, *News Release,* Table F-2 (May 16, 2002), *available at* www.uscourts.gov/Press_Releases/bk302.pdf, double the number that would be expected if these filings were spread evenly across the circuits. Even more important, a survey published last year reported that the bankruptcy court in Delaware is the forum for *over 60%* of the bankruptcy reorganizations of large public companies filed in the United States. LoPucki, L. and Kalin, S., *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a "Race to the Bottom,"* 54 Vand. L. Rev. 231 (2001). The decision below, by permitting debtors to rid themselves of the "indigestion" of a collective bargaining agreement without the restrictions imposed by Congress in Bankruptcy Code § 1113, may well make this imbalance even worse.

Department of Labor, Bureau of Labor Statistics, "Union Members in 2001," Table 1 (January 17, 2002), *available at* http://www.bls.gov/news.release/union2.toc.htm. The proper interpretation of section 1113, never before addressed by this Court, is plainly of paramount national importance. EPMC respectfully urges that this case is the appropriate vehicle for the Court to clarify that, apart from the new legal standard for rejection established by section 1113, *Bildisco* remains good law. And under *Bildisco*, if a collective bargaining agreement or other executory contract is not rejected, the contract continues – after confirmation of a plan of reorganization – to bind the reorganized debtor with all of the contractual obligations intact. 465 U.S. at 531-32.

CONCLUSION

For the reasons described above, EPMC respectfully requests that the petition for certiorari to the Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

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